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Nos. 84-518 and 84-710

SUPREME COURT OF THE UNITED STATES
October Term, 1984

ROBERT W. JOHNSON, et al.,
Petitioners
v.
MAYOR & CITY COUNCIL OF BALTIMORE
Respondents

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Petitioner
v.
MAYOR & CITY COUNCIL OF BALTIMORE
Respondents

BRIEF OF AMICI CURIAE COMMONWEALTH OF MASSACHUSETTS, COMMONWEALTH OF KENTUCKY, COMMONWEALTH OF PENNSYLVANIA, STATE OF INDIANA, STATE OF LOUISIANA, STATE OF MISSISSIPPI, STATE OF MISSOURI, STATE OF NEW JERSEY, STATE OF OHIO, STATE OF TENNESSEE

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INTEREST OF THE AMICI CURIAE

The States identified above submit this brief amici curiae to address the standards governing the establishment of

a bona fide occupational qualification ("BFOQ") in a public safety context under the Age Discrimination in Employment Act ("ADEA").

As States, the amici are responsible for the protection of the public safety through the establishment of law enforcement and firefighting forces at state and local levels. To promote the effective performance of the strenuous and hazardous duties required for such positions, each of the amici has enacted legislation mandating the retirement of public safety personnel earlier than age seventy. This Court's articulation of the standards governing the recognition of a BFOQ in a public safety context will have a significant practical impact upon the defense of such statutes.

SUMMARY OF ARGUMENT

The BFOQ exception is an integral part of the ADEA, and it is entitled to be given full effect in accordance with its language and underlying congressional intent. While the ADEA unquestionably is directed to eliminating arbitrary age discrimination, the BFOQ exception recognizes that there are certain contexts in which age legitimately can be relied upon as an important indicator of ability. (Pp. 6-17.)

In a limited number of hazardous and arduous occupations such as firefighting and law enforcement, there is a factual basis for believing that age is an important indicator of job performance. The standard for establishing a factual basis for mandatory retirement from such protective service jobs should be placed

so that the risk of error favors, rather than jeopardizes, the public safety. (Pp. 17-25.)

To establish a BFOQ defense in ADEA cases where the "normal operation of the particular business" directly involves public safety, the employer should not be required to convince the factfinder in each case that the age qualification is absolutely necessary. That would be contrary to the statutory language, would place an extraordinary burden upon the establishment of a BFOQ, and would jeopardize the public safety. The ADEA requires only that the age qualification be "reasonably necessary" to the public safety function. A showing of reasonable cause, that is, a factual basis for believing, or of a rational basis in fact for believing, that age is an important indicator of ability, should suffice to

establish a BFOQ. Such a showing may be made by reasonable reliance upon responsible expert opinion or upon other sources of proof such as, in an appropriate case, congressional findings of fact, either express or implied. Under this standard, the judgment of the court of appeals should be affirmed. (Pp. 25-38.)

ARGUMENT

The decision in this case will dramatically affect the ability of state and local governments to promote public safety by establishing age limitations upon service in public safety positions such as firefighters or police officers. The rationality of such limitations was recognized, in an Equal Protection context, in Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976). In

E.E.O.C. v. Wyoming, 460 U.S. 226 (1983), this Court held out the promise that States could continue to promote public safety through mandatory retirement provisions under the ADEA, if they could establish that age was a bona fide occupational qualification for such positions. This case raises the practical question of the proof which is required to establish such a public safety BFOQ.

I. CONGRESS FULLY INTENDED TO ALLOW MANDATORY RETIREMENT IN OCCUPATIONS WHERE AGE IS AN INDICATOR OF JOB PERFORMANCE.

Age discrimination in employment results, not from dislike or intolerance for the older worker, but from erroneous assumptions about the effects of age upon performance. United States Department of Labor, Report to the Congress on Age

Discrimination in Employment under § 715 of the Civil Rights Act of 1964 (June 1965), at 2. In enacting the ADEA, Congress intended to eradicate these erroneous assumptions by prohibiting "arbitrary discrimination in employment." 29 U.S.C. § 621(b) (statement of congressional purpose) (emphasis added). As Secretary of Labor Willard Wirtz wrote to the Speaker of the House: "The legislation would clearly indicate that the prohibitions are designed to ban arbitrary age discrimination." Reprinted in 113 Cong. Rec. 1377 (January 24, 1967) (emphasis added). Members of the House of Representatives who debated passage of the ADEA in 1967 similarly directed their concerns toward arbitrary discrimination on the basis of age. See, e.g., 113 Cong. Rec. 34743 (remarks of Rep.

Mink); 113 Cong. Rec. 34744 (remarks of Rep. Pucinski) (1967).

Unlike racial discrimination, which is invidious under all circumstances, age discrimination is not invidious when there is a factual basis for believing that age is related to ability for a particular occupation. "[W]e accept the factual and legal validity of using age as a prediction of certain physical and agility skills . . . and we accept that age does so in such a sufficiently efficient manner that its use is not necessarily suspect." E.E.O.C. v. University of Texas Health Science Center, 710 F.2d 1091, 1097 (5th Cir. 1983) (Higginbotham, J., specially concurring). In including the BFOQ defense as part of the ADEA, Congress explicitly recognized that there are circumstances under which age can in

fact be an important indicator of job performance. Where "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business," 29 U.S.C. § 623(f)(1), it is permissible to discriminate on the basis of age, because the discrimination is not based upon assumptions or stereotypes about the ability of older workers. Thus, in the Senate hearings which preceded passage of the ADEA Secretary Wirtz stated:

> [The Act] does not prohibit or apply in any way to differentiations or distinctions being made on the basis of age so far as there is legitimate relevance between age and employment capacity.

Age Discrimination in Employment Act of 1967: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 37 (1967).

The petitioners in No. 84-518 miss the point of the BFOQ exception when they rely upon generalized legislative statements concerning the ADEA's requirement that employers make individualized employment determinations, citing the statement in E.E.O.C. v. Wyoming, supra, that the ADEA requires States to make retirement determinations "in a more individualized and careful manner." 460 U.S. at 239. Brief for Robert W. Johnson, et al., at pp. 8, 34-35. This selective quotation ignores the crucial alternative which follows:

> Perhaps more important, appellees remain free under the ADEA to continue to do precisely what they are doing now, if they can demonstrate that age is a "bona fide occupational qualification" for the job of game warden.

E.E.O.C. v. Wyoming, 460 U.S. at 240 (emphasis in original). This Court

there recognized the distinction between the Act's general requirement of individualized determinations on the one hand, and the role of the BFOQ on the other. That BFOQ defense embodies its own congressional purpose, which is entitled to be given full effect.

The principal guidance as to the purpose and scope of the BFOQ exception is found in the legislative history of the 1978 ADEA amendments, which focused upon the question of mandatory retirement. Age Discrimination in Employment Act Amendments of 1978, P.L. 95-256, 92 Stat. 189.*/ It is disingenuous to suggest that this history indicates that manda-

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*/ Reliance upon the views expressed by subsequent sessions of Congress is permissible and appropriate in this case. See Heckler v. Turner, ___ U.S. ___, 53 U.S.L.W. 4211, 4218 (February 27, 1985).

tory retirement for public safety positions is "contrary to the 'primary purpose' of the 1978 Amendments." Brief for the Equal Employment Opportunity Commission at 16. Such a contention is misleading because the House Report which articulated that primary purpose continued, as follows:

> "While it is the primary purpose of this legislation to limit mandatory retirement . . ., it is not intended that the bill prohibit mandatory retirement or other employment practices where age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular activity . . .."

H.R. Rep. No. 95-527, pt. 1, 95th Cong., 1st Sess. 12 (1977).

The legislative history of the 1978 Amendments shows congressional concern that removing the bona fide pension plan exception's shelter for mandatory retirement provisions not result in prohibiting

mandatory retirement under all circumstances, thereby jeopardizing public safety. The Senate bill provided that 29 U.S.C. § 623(f)(1) be amended to expressly state that mandatory retirement pursuant to a BFOQ was permissible. One of the bill's managers, Senator Williams, expressing the belief that "we should not prevent mandatory retirement in those instances where age has been established as a bona fide occupational qualification," went on to explain:

> President Carter . . . asked that we clearly permit the establishment of a designated retirement age of less than 70 where age has been shown to be an important indicator of job performance. For some types of work, for example, law enforcement activity, there may be a factual basis for believing that substantially all employees above a specified age will be unable to continue performing their duties. In addition, it may be impossible or impractical to determine through medical examinations and periodic re-

views of job performance the employee's capacity or ability to continue working safely and effectively.

123 Cong. Rec. 34296 (1977) (emphasis added).

The House bill did not contain such an amendment; but the House Committee on Education and Labor Report emphasized that:

> [I]t is not intended that the bill prohibit mandatory retirement or other employment practices where age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular activity such as provided for in the current law in section 15(b) and 4(f)(1). It is recognized that certain mental and physical capacities may decline with age, and in some jobs with unusually high demands, age may be considered a factor in hiring and retaining workers. For example, jobs such as those in air traffic control and in law enforcement and firefighting have very strict physical requirements on which the public safety depends. The Committee, however, expects that age will be a relevant criteria for only a limited number of jobs.

H.R. Rep. No. 95-527, 95th Cong., 1st Sess. 12 (1977) (emphasis added). In keeping with this view that no amendment was needed to preserve mandatory retirement where age is a BFOQ, the Senate's proposed amendment to § 623(f)(1) was deleted in conference for the following reason: "The conferees agreed that the amendment neither added to nor worked any change upon present law." H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 7 (1978).

In addition to confirming that Congress fully intended that mandatory retirement could be justified as a BFOQ, this history reveals that Congress thought of public safety occupations as the context in which a BFOQ was likely to be established. It was not by chance that law enforcement and firefighting jobs were given as examples in the state-

ments quoted above. See also the following colloquy between Senators Javits and Griffin:

MR. GRIFFIN:

> I do not understand what the standard is supposed to be. Would he say, for example, that if most policemen are physically unqualified after age 65 to continue to serve on the police force, then all policemen could be required to retire at 65, rather than 70?

MR. JAVITS:

> If it is reasonable, factually based, and can be justified as a bona fide occupational qualification for that type of employment.

123 Cong. Rec. 34319 (1977).

This history refutes any assertion that the mandatory retirement of public safety personnel is contrary to congressional intent. Rather, it demonstrates that the primary legislative concern which underlies the BFOQ exception is public safety: where conduct of the

"particular business" requires strenous physical duties and implicates the safety of the public, an employer may, by virtue of the exception, impose "reasonably necessary" age limitations "for that type of employment." 123 Cong. Rec. 34319 (1977) (remarks of Sen. Javits). The BFOQ defense is an important and integral part of the ADEA, and is entitled to be construed according to its language and in light of the congressional purposes which it embodies.

II. WHERE PUBLIC SAFETY IS ACTUALLY IMPLICATED, THE RISK OF ERROR SHOULD BE PLACED SO AS TO FAVOR, NOT JEOPARDIZE, IT.

The values served by the ADEA's general prohibition against age discrimination are important ones, which are shared by the amici States. The values served by a public safety BFOQ, however, are

also worthy of very serious concern -- concern which is embodied in the BFOQ provision of the Act. In most contexts, not involving public safety, mandatory retirement provisions reflect employer concern for economic efficiency. In the context of public safety, however, the concern is for the safe and effective performance of duties which are essential to the protection of human life.

In the Hearings before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 103-04 (1967), Sen. Pell voiced concern about legislation which might place "a straightjacket on endeavors which have a safety involvement." The BFOQ provision was intended to prevent such a result.

The lower courts repeatedly have held that where public safety is the essence of the business, the standard for estab-

lishing a BFOQ should not be strict. "[T]he risk of error when public safety is proved to be actually implicated is resolved in favor of safety." E.E.O.C. v. University of Texas Health Science Center, 710 F.2d 1091, 1097 (Higginbotham, J., specially concurring). See also, e.g., Murnane v. American Airlines, Inc., 667 F.2d 98, 101 (D.C. Cir. 1981); Orzel v. City of Wauwatosa Fire Department, 697 F.2d 743, 750 (7th Cir. 1983); Tuohy v. Ford Motor Company, 675 F.2d 842, 845 (6th Cir. 1982); E.E.O.C. v. County of Santa Barbara, 666 F.2d 373, 377 (9th Cir. 1982); Aritt v. Grisell, 567 F.2d 1267, 1271 n. 14 (4th Cir. 1977); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 238 (5th Cir. 1976); Hodgson v. Greyhound Lines, Inc., 499 F.2d 859, 861, 863 (7th Cir. 1974).

The amici do not disagree with the proposition that a "factual basis" should be required to establish a BFOQ. The establishment of a BFOQ must be based upon more than mere assumptions, labels or stereotypes. The BFOQ is an affirmative defense, see E.E.O.C. v. Wyoming, supra, 460 U.S. at 240, requiring proof of a factual basis for believing that the age classification is not unreasonable or arbitrary. This affirmative burden distinguishes BFOQ analysis under the ADEA from Equal Protection analysis in an age classification context, where the burden is upon the plaintiff to establish the irrationality of the classification. See Massachusetts Board of Retirement v. Murgia, 427 U.S. 306 (1976).

Contrary to the impression which the petitioners seek to create, however,

there is a substantial factual basis to believe that age is an important indicator of job performance in public safety occupations such as firefighting and law enforcement. Experts in physiology, cardiology and related fields have successfully established this in numerous recent cases. E.g., E.E.O.C. v. City of St. Paul, 500 F. Supp. 1135 (D. Minn. 1980) (age a BFOQ for municipal firefighters), aff'd on other grounds, 671 F.2d 1162, 1167 (8th Cir. 1982) ("Although not at issue since the EEOC dismissed its cross-appeal, the district court's finding that age is a BFOQ for firefighters, fire equipment operators, and fire captains is amply supported by the record."); E.E.O.C. v. Wyoming, No. C80-0036B (D. Wyoming 1983) (jury verdict, after remand from this Court, that

age is a BFOQ for the job of game warden); E.E.O.C. v. Missouri State Highway Patrol, 748 F.2d 447 (8th Cir. 1984) (age a valid BFOQ); E.E.O.C. v. Commonwealth of Pennsylvania, 596 F. Supp. 1333 (M.D. Pa. 1984) (age a valid BFOQ for State Police); Mahoney v. Trabucco, 738 F.2d 35 (1st Cir. 1984), petition for cert. denied, 53 U.S.L.W. 3403 (November 26, 1984) (age a valid BFOQ for Massachusetts State Police).

The evidence in these cases necessarily supports the conclusion that there is a substantial risk to the public safety from a BFOQ standard which places too heavy a burden upon the employer. The cases represent responsible expert opinion that age is an important indicator of effective job performance for such protective service occupations; and the

existence of this expert opinion shows that an application of the ADEA which is overly protective of the rights of employees not to be discriminated against on the basis of age may place the lives of other individuals in danger. Firefighting and law enforcement personnel literally are called upon, in the normal course of their duties, to save human lives. The ability to perform the physical functions which are necessary to the safe and effective performance of those duties has been proven in the cases cited above, and others, to decline with age. It is not overstating matters to say that in a case where public safety is unquestionably involved, as here, human lives may depend upon the result. The qualifying language of the BFOQ that the age classifications need only be

"reasonably necessary" should be given weight in light of the implications for the public safety.

This approach to the BFOQ exception will not be open-ended, but will apply to a narrow range of occupations. The legislative history of the ADEA shows that public safety mandatory retirement is the paradigm of what Congress intended to permit under the BFOQ provision. The BFOQ section of the ADEA has generated case law limited generally to two private occupations (intercity bus drivers, and airline cockpit personnel) and two public occupations (firefighters and law enforcement). For occupations not truly implicating public safety, the courts have developed tests for keeping the scope of the BFOQ exception a narrow one. See Diaz v. Pan American World Airways,

Inc., 442 F.2d 385 (5th Cir. 1971) (Title VII sex discrimination for flight attendants); cf. TWA v. Thurston, 105 S. Ct. 613, 622 (1985) (BFOQ applicable to particular jobs). For contexts in which public safety is truly and directly implicated, however, the standard for establishing a BFOQ should not be strict. To improvidently place the risk of error would be to jeopardize the public safety.

III. PROOF OF A "FACTUAL BASIS" IN A PUBLIC SAFETY CONTEXT SHOULD BE SATISFIED BY ESTABLISHING THAT THE AGE CLASSIFICATION IS OBJECTIVELY REASONABLE.

The BFOQ defense is established where the employer shows that "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1). In firefighting and law

enforcement positions, the normal operation of the particular business involves strenuous and hazardous activity which is essential to the protection of the public safety.

Under such circumstances, the statute expressly provides that employers, such as state and local governments, may use an age classification if it is "reasonably necessary." The introduction of evidence showing that there is "reasonable cause, that is, a factual basis for believing" that age is a BFOQ satisfies that standard.

The "reasonable cause" standard has been adopted by most courts of appeals as an important part of a more general test which has been articulated as follows:

> (1) The classification must be reasonably necessary to the essence of the employer's business; and

> (2) the employer must have reasonable cause, that is, a factual basis for believing either that all or substantially all persons within the excluded class would be unable to perform safely and efficiently the duties of the job or that it is impossible or impractical to deal with persons over the age limit on an individualized basis.

E.E.O.C. v. University of Texas Health Science Center, 710 F.2d 1091, 1093 (5th Cir. 1983). The first component of this test is not an issue in the present context -- the protection of the public safety is the essence of the business of state and local law enforcement and firefighting forces, and it is precisely through the hazardous and strenuous duties of the firefighters and police officers that these public safety purposes are carried out. There is an obvious and undeniable necessary and direct relationship between the duties of, such jobs and the public safety.

The question whether the age classification is reasonably necessary to the effective performance of the public safety duties involved has generally been viewed by the courts of appeals under a "reasonable cause" standard. The BFOQ language does not require that an employer must actually prove, by a preponderance of the evidence, one or both of the subparts of the "reasonable cause" component of the test quoted above (i.e., that substantially all persons over the age cannot perform safely and efficiently the duties of the job; or that it is impractical to deal with persons over the age limit on an individualized basis). Contra, Brief for Robert W. Johnson, et al., at 6.

The two seminal cases developing standards for evaluating a BFOQ under

the ADEA, although phrasing the test differently, both recognized that some judgment and discretion should be afforded to the employer in the interest of public safety. In Hodgson v. Greyhound Lines, Inc., 499 F.2d 859, 863 (7th Cir. 1974), the court of appeals held that the BFOQ standard was satisfied by a "rational basis in fact to believe" that elimination of the age requirement would minimally increase the likelihood of risk of harm to bus passengers and other motorists, stating:

> "Greyhound need not establish its belief to the certainty demanded by the Government. . . . Greyhound has amply demonstrated that its maximum hiring age policy is founded upon a good faith judgment concerning the safety needs of its passengers and others. It has established that its hiring policy is not the result of an arbitrary belief lacking in objective reason or rationale.

499 F.2d at 865 (emphasis added). In Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 236 (5th Cir. 1976), the court of appeals similarly held that the BFOQ standard was satisfied by "reasonable cause, that is, a factual basis for believing" that one or both subparts of the second component of the test quoted on pp. 26-27, above, were met, explaining:

> The employer must of course show a reasonable basis for its assessment of the risk of injury/death. But it cannot be expected to establish this to a certainty, for certainty would require running the risk until a tragic accident would prove that the judgment was sound.

531 F.2d at 238 (emphasis added). For more recent cases see, e.g., Johnson v. American Airlines, Inc., 745 F.2d 988, 993-94 (5th Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3600 (1985) ("American need only show that it has a

reasonable basis for its assessment of the safety risks involved"), and Murnane v. American Airlines, Inc., 667 F.2d 98 (D.C. Cir. 1981), where the court upheld a BFOQ on the following basis:

> We believe that the District Court's findings of fact . . . support the conclusion that American's hiring policies, including the age forty guideline, might result in the death of one less person than were American forced to abandon or modify these policies.

667 F.2d at 101 (emphasis added). The reasonable discretion which these cases provide for the protection of the public safety through mandatory retirement provisions pursuant to a BFOQ implements accurately the congressional intent underlying § 623(f)(1).

Notwithstanding these public safety considerations, and the "factual basis" for mandatory retirement of public safety

officers established by a series of recent trials throughout the country, petitioners argue that employers must convince the factfinder in each case that the age qualification is in fact necessary to the public safety. See, e.g., Brief for Robert W. Johnson, et al., at 12, 13; Brief for E.E.O.C. at 11, 12, 20, 21, 23, 24 (repeatedly characterizing the BFOQ as requiring that the age classification be "necessary," disregarding the qualifying adverb, "reasonably"). Many small public employers, such as towns or counties, may not have the resources to present expert testimony or the sophistication to effectively challenge the E.E.O.C.'s contrary experts as to this ultimately scientific question. Moreover, juries asked to find that age is absolutely necessary may find against

the public safety employer when the weight of the expert testimony is closely or evenly balanced. The result may be that some jurisdictions are forced to abolish mandatory retirement laws which Congress intended to be lawful under the ADEA, while other jurisdictions with similar forces validate their public safety mandatory retirement provisions at great litigation expense. Further, such results may, and already are tending to, create an incongruous checkerboard of jurisdictions with valid and invalidated BFOQ's for essentially similar jobs. Indeed, the petitioners' insistence upon a case-by-case approach with a full panoply of competing experts debating what is essentially the same question in many jurisdictions throughout the country promises to create an aggre-

gate burden upon state and local governments.

The BFOQ standard does not, and as a matter of policy should not, turn upon an endless series of battles of the conflicting opinions of expert witnesses where public safety is at stake. Rather, the existence of a BFOQ depends upon whether it is reasonable for an employer to rely upon a mandatory retirement age as being supported by responsible expert opinion or other equivalent evidence. In the area of public safety, where the risk of harm to third parties may turn upon the result, it is essential to give full force and recognition to the qualifying language of the statutory provision: the age classification must only be "reasonably necessary."

The most obvious type of proof satisfying this statutory standard would be

responsible expert opinion, such as was presented in the cases cited above at pp. 21-22 and by Baltimore in the district court in this case. Such expert opinion, without more, establishes "reasonable cause, that is, a factual basis for believing," or "a rational basis in fact to believe," that substantially all persons over the age limit are unable to perform the duties of the job safely and effectively, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis. Reliance upon responsible, qualified expert opinion is precisely the type of evidentiary standard which guards against stereotypical or arbitrary age discrimination while assuring that the public interest in preserving the public safety is protected. It provides a "factual

basis" establishing that age is a "reasonably necessary" BFOQ.

The fact that other experts disagreed with Baltimore's experts does not negate the reasonableness of Baltimore's reliance upon its experts, unless they are found to be unqualified or irresponsible. To make the result turn upon a choice between the views of several responsible experts would be to impose a burden upon Baltimore of providing that age is absolutely necessary -- a burden which exceeds the requirements of the statute.

Alternatively, it also should be reasonable to rely upon Congressional findings of fact, expressly stated or implicitly relied upon in the enactment of federal laws. In this sense, the rationale of the court of appeals could be upheld on the basis of the congressional deter-

mination to retire federal firefighters at age 55.

The amici do not address in depth the more narrow issue of whether such reliance upon cognate federal laws was justified in this particular case. However, they do note that the United States Department of Labor, Report to the Subcommittee on Labor of the Senate Committee on Human Resources (Sept. 26, 1977) stated, at 15: "To the extent that federal laws provide early mandatory retirement ages, it represents Congressional judgment that after a certain age, the specific requirement of the job cannot be met by the older worker." Reprinted at p. 338 of the Hearings on the ADEA Amendments of 1977 before the Subcomm. of Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. (1977).

It has been eight years since Congress expressly considered this issue in the course of the 1978 Amendments, and any suggestion that the retention of the age limit of 5 U.S.C. § 8335(b) is temporary is by now untenable. Congress apparently is content that such age limits are not invidious, a conclusion which supports the rationale of the court of appeals.

CONCLUSION

The result reached by the court of appeals was correct. In articulating the standards governing the establishment of a BFOQ, this Court should require only that the public employer establish reasonable cause, that is, a factual basis, for believing that age is an important indicator of job performance. To

require more would unduly jeopardize the public safety, and would be unfaithful to the statutory language and the intent of Congress in enacting the "reasonably necessary BFOQ" exception.

Respectfully submitted,

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